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Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al., *Appellants,*

v.

ORRIN W. FOX CO., et al., *Appellees.*

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al., *Appellants,*

v.

ORRIN W. FOX CO., et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Appellees General Motors Corporation, Orrin W. Fox Co. and Muller Chevrolet hereby move, pursuant to Supreme Court Rule 16, that the judgment of the United States District Court for the Central District of California be summarily affirmed on the grounds that the decision below is manifestly correct and in accord with the decisions of this Court and of the lower federal courts, that the questions sought to be presented by these appeals are so insubstantial as not to require further briefing or argument, and that summary affirmance of the judgment is called for in any event on alternative grounds not reached by the court below.

STATEMENT OF THE CASE

At issue in this case is the constitutionality of those portions of the California Automobile Franchise Act ("the Act") (California Vehicle Code §§ 3060-3069, appended as Exhibit H to State Appellants' Jurisdictional Statement)[1] which relate to the establishment and relocation of automobile dealerships. The challenged statutory provisions place in the hands of existing private automobile dealers the arbitrary and unfettered power to restrain potential competitors from establishing or relocating dealerships in "their" relevant market areas for months before any state adjudication — without requiring any showing of probable success, without affording the affected parties any opportunity to be heard, and without any review or determination by any public official or entity. The primary issues posed are whether these statutory procedures can withstand constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment, or under the Supremacy Clause because of their direct and dramatic conflict with the federal antitrust laws.[2] The court below held the challenged procedures constitutionally infirm on due process grounds, and consequently did not reach the antitrust issues presented.

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[1] For ease of reference, New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California and the Director of the Department of Motor Vehicles of the State of California, appellants in No. 77-837, will be referred to as "State Appellants," and Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California, appellants in No. 77-849, as "Intervenor Appellants."

[2] It should be stressed at the outset that what is *not* at issue in this case is the unquestioned power of the state to regulate in the area of automobile franchising. What is at issue is whether the state has exercised that regulatory power in a manner which contravenes the Due Process and Supremacy Clauses of the United States Constitution.

1. The Challenged Portions of the State Statute

The provisions of the Act at issue provide that before an automobile manufacturer and its proposed or existing franchisee may establish a new automobile dealership or relocate an existing one, written notice of the proposed establishment or relocation must be given to the New Motor Vehicle Board and to all existing dealers for the "same line-make" within the "relevant market area." Cal. Veh. Code § 3062. The "relevant market area" is defined as the "area within a radius of 10 miles from the site of a potential new dealership" (approximately 314 square miles). Cal. Veh. Code § 507.

Any existing dealer receiving such a notice (i.e., any direct competitor of the potential new or relocated dealership within the 314 square mile area) may, within 15 days thereafter, file with the Board a "protest" to the proposed establishment or relocation of the competitive dealership. Such a protest, as the court below found, may (and usually does) consist of nothing more than a letter stating "I protest." The Act requires no showing of any kind, nor indeed even a contention, by the protesting dealer that the proposed establishment or relocation will have any impact upon his operations, that it is in any way unfair or inimical to the public interest, or that there is any likelihood whatever that the protesting dealer will be able to sustain his protest on the merits.

The mere sending of the protest letter is enough to prevent the establishment or relocation of the competitive dealership, because upon receipt of such a protest, the Board is required by the Act automatically — without affording the affected parties prior notice or opportunity to be heard, without any showing of good cause by the protesting party, and without any preliminary determination or inquiry into the merits of the protest — to issue an order enjoining the proposed establishment

or relocation of the dealership until the Board has held a hearing and made a final decision as to whether or not "there is good cause for not permitting such dealership." Cal. Veh. Code § 3062. In contrast to procedures surrounding issuance of judicial restraining orders, there is no provision in the Act for hearing any challenge to an improvidently-issued injunctive order prior to the Board's final decision. Establishment or relocation of the proposed franchise in violation of the Board's injunctive order is criminally punishable as a misdemeanor, Cal. Veh. Code §§ 11713.2(*l*) and 40000.11, and constitutes grounds for suspension or revocation of the manufacturer's and dealer's licenses to do business in California. Cal. Veh. Code § 11705(a)(10).

In addition to issuing the injunctive order, the Board is required upon receiving a protest to issue an order fixing the time for a hearing within sixty days following such order. Cal. Veh. Code § 3066(a).[3] When a hearing finally does occur, it may be before the Board or before a hearing officer designated by the Board. Cal. Veh. Code § 3066(a). If the matter is heard by the Board itself, and the Board fails to act within thirty days after such hearing, the proposed action is deemed approved. Cal. Veh. Code § 3067. If, however, the matter is heard by a hearing officer, the officer is required to submit a proposed decision to the Board, Cal. Gov. Code § 11517(b), and there is no time limit set for the submission of that proposed decision. After it receives the proposed decision, the Board has thirty days to affirm or reverse, Cal. Veh. Code § 3067, unless the Board desires to hold further proceedings, in which case there is no time limit for decision. The Board need only issue a decision "within

[3] Although the court below was "inclined to interpret the Act as requiring the injunction and the order [setting hearing] to be promulgated concurrently," it noted that in the case of appellee Orrin W. Fox Co., the Board waited six weeks after issuing the injunction before it issued its order setting a hearing date.

such period as may be necessitated" by the additional proceedings. Cal. Veh. Code § 3067.

2. The Factual Setting: Impact Upon Appellees and Others Similarly Situated

The grievous impact which the challenged procedures have had upon those who seek to relocate or establish automobile dealerships is graphically demonstrated by the experience of appellees under the Act.[4]

In May 1975, appellee Orrin W. Fox Co. entered into a franchise agreement with appellee General Motors for establishment of a Buick dealership in Pasadena, California. After more than 40 years of continuous Buick representation, Pasadena's only Buick dealer had terminated his franchise over a year earlier, and no replacement dealer had yet been established. Nonetheless, protests were promptly filed by two dealers located in adjacent cities, and appellees were thereafter automatically enjoined from establishing the dealership. In July 1975, the Board noticed the protests for hearing. The hearing was initially set for August 1975, but as a result of delays was in fact not held until September 1976. Opinion at 32-33. The Board ultimately found the protests to be without merit. But, "under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay." Opinion at 33.

[4] The factual narrative in this section is drawn from the findings of the court below, which were based upon "the uncontradicted affidavits and documentary exhibits submitted by the parties." State Appellants' Jurisdictional Statement Exhibit A (hereinafter "Opinion") at 32.

The deprivation inflicted by the Act's challenged procedures upon appellee Muller Chevrolet also resulted in a costly loss. Muller was an existing Chevrolet dealer who sought to relocate from antiquated, inadequate and rapidly deteriorating physical facilities to a larger and modern location a short distance away, from which another automobile dealer contemplated moving. After a year of complex and time-consuming negotiations, Muller obtained a leasehold agreement and in January 1976, General Motors gave notice of Muller's intent to relocate to the nearby facilities. In February 1976, however, two dealers located in other cities within the 314 square mile "relevant market area," sent letters to the Board "saying, in effect, no more than 'I protest.'" Opinion at 33-34. The Board issued its automatic order enjoining Muller's relocation and subsequently scheduled a hearing for June, more than four months after issuance of the injunction. Despite the fact that appellee Muller ultimately prevailed on the merits of the protests, it was a Pyrrhic victory, for in the course of the nine-month delay occasioned by the unmeritorious protests, "Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon 'gave up' with respect to this litigation and is starting all over again in his attempt to find a new site for his business." Opinion at 35. Should he succeed in finding such a new site, of course, appellee will again face under the Act the same prospect of a competitor's bald protest, an automatic injunctive order of indeterminate duration preventing the relocation, costly delay and possible ultimate loss of the proposed relocation premises.

3. Proceedings Below

On April 13, 1976, appellees filed the instant action in the United States District Court for the Central District

of California seeking to have the challenged portions of the Act declared unconstitutional, on their face and as administered, and to enjoin their enforcement. The complaint alleged *inter alia* that the provisions of the Act in question violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they permitted private automobile dealers arbitrarily to obtain injunctive orders restraining competing dealers from establishing or relocating dealerships in "their" relevant market areas, without affording the affected parties any prior or prompt opportunity to be heard, without any showing of good cause by the protesting dealer and without any prior review or investigation by a public official or agency; that such portions of the Act were in direct conflict with the federal antitrust laws and therefore invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2); and that the Act imposed an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). A three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284.

On June 7, 1976, appellees moved for partial summary judgment on the Due Process and Supremacy Clause challenges to the Act. After extensive briefing by the parties, the court held argument on September 20, 1976.

One year later, on September 14, 1977, the three-judge court issued its decision declaring the challenged portions of the Act unconstitutional and enjoining their implementation and enforcement. In a twelve-page opinion, the court unanimously held that the statutory procedures were "in gross violation of the Due Process Clause of the Fourteenth Amendment." Opinion at 35.

The court below noted that under the decisions of this Court, the right to "liberty" protected under the Due

Process Clause includes the freedom "to engage in any of the common occupations of life." While certainly not unlimited or shielded from state regulation, such liberty rights may be restricted or abridged only in conformity with the constitutional guarantees of procedural due process of law. Opinion at 35. Central to such due process guarantees, noted the court, is the opportunity for a meaningful hearing prior to the abridgment of one's protected liberty interests. Opinion at 35-37.

The challenged procedures, the court below found, provide the affected parties with no such opportunity to be heard prior to having their protected liberty interests abridged. Rather, the procedures empower private automobile dealers, on their own and without any governmental determination or inquiry, to restrict others from relocating in new facilities or from establishing new dealerships by the mere filing of a simple "protest." "Little imagination is needed," noted the court, "in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probably [*sic*] success, irreparable injury if his protest is not granted, or a bond or any other undertaking." The unrestricted operation of such delegated power in the hands of private businesses, the court found, "could seriously hamper or even completely destroy" proposed competing operations. Opinion at 32.

The court rejected appellants' contention that there was sufficient justification in this case for the immediate abridgment of rights prior to any hearing, noting that this Court has sanctioned such action only in "extraordinary situations . . . when a responsible public official concludes that to delay action pending a hearing would likely result in serious harm to the public." Opinion at 36-37. The court contrasted the unrestricted power to cause the issuance of an administrative injunction

granted to private parties by the Act, with the procedural safeguards and court scrutiny involved when private parties seek a judicial preliminary restraining order. Opinion at 37.

In view of its findings on the due process issues, the court found it unnecessary to reach the antitrust/Supremacy question presented. Opinion at 38.

Finally, the court addressed the abstention issue raised by appellants. Noting that there was no state litigation pending which potentially "would result in an adjudication that would deal with the constitutional problem here presented," and finding that the Act is "clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process," the three-judge court concluded that it need not and, indeed, could not abstain from adjudicating the federal constitutional issues presented. Opinion at 38-40.

QUESTIONS PRESENTED

1. Was the three-judge court correct in holding that the challenged portions of the California Automobile Franchise Act are invalid under the Due Process Clause of the Fourteenth Amendment because they empower private automobile dealers arbitrarily to restrain competitors from establishing or relocating dealerships in "their" relevant market areas, without affording the affected parties any prior opportunity to be heard, without requiring any showing of good cause and without any prior review or investigation by a public entity or official?

2. Was the court below required to abstain from adjudicating the federal constitutional issues posed by the state statute, where the court found that the Act was unambiguous and that there was no state litigation pending which might resolve or eliminate the federal issues

presented, and where no uncertain state law issues existed which could potentially harmonize the Act with federal constitutional requirements?

3. Is the California Act invalid under the Supremacy Clause because it conflicts with federal antitrust laws?[5]

[5] If this Court should note probable jurisdiction, appellees will also brief and argue, as an alternative ground for affirming the judgment of the Court below, that the challenged portions of the California Act are invalid under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) because they impose an undue burden on interstate commerce. *See General GMC Trucks, Inc. v. General Motors Corp.*, 329 Ga. 373, 237 S.E.2d 194, *cert. denied*, 46 U.S.L.W. 3389 (1977).

ARGUMENT

Appellants assert that the instant appeal presents for review a number of substantial questions, particularly with regard to the due process issues involved, which appellants claim were erroneously decided by the court below. In fact, as appellees will demonstrate, the three-judge court's resolution of those issues was manifestly correct, and should be summarily affirmed by this Court without further briefing or argument. *See, e.g., Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971). This Court has on numerous occasions in the last several years addressed itself to the procedural due process requirements of the Fourteenth Amendment and to the parameters of the "liberty" and "property" interests protected thereunder.[6] Hence this appeal is not a case where the Court is called upon to address novel or unresolved issues of a substantial nature. Nor have appellants pointed to any conflict in decision by the lower courts which requires resolution by this tribunal.[7] Finally, even if this Court should conclude that the due process questions presented by appellants would otherwise be substantial enough to warrant further briefing and argument, appellees submit that the judgment below should nonetheless be summarily affirmed, because the portions of the Act declared unconstitutional by the three-judge court on due process grounds are patently invalid as well under the

[6] *See, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

[7] The Georgia Supreme Court recently invalidated that state's parallel automobile dealership establishment and relocation provisions on Commerce Clause grounds. *General GMC Trucks, Inc. v. General Motors Corp.*, 329 Ga. 373, 237 S.E.2d 194 (1977). This Court denied certiorari. 46 U.S.L.W. 3389 (December 12, 1977).

Supremacy Clause, in view of their clear conflict with the federal antitrust laws.[8]

I. THE THREE-JUDGE COURT'S RULING THAT THE CHALLENGED PORTIONS OF THE ACT ARE IN GROSS VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS MANIFESTLY CORRECT AND SHOULD BE SUMMARILY AFFIRMED

A. The Statutory Procedures Which Permit Private Automobile Dealers Arbitrarily To Restrain Competitors From Establishing or Relocating Dealerships in "Their" Relevant Market Areas Without Affording the Affected Parties Any Prior Opportunity To Be Heard and Without Any Prior Review by a Public Entity Clearly Violate Due Process Guarantees

While there has indeed been controversy over the meaning of the Due Process Clause, there can be no doubt that at minimum due process requires that when the state seeks to deprive a person of life, liberty or property, it must afford notice and a meaningful opportunity to be heard *prior* to imposing the deprivation. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This cardinal principle, fundamental to the concept of due process of law, has been repeatedly reaffirmed by this Court. *E.g. Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339-40 (1969).

Matched against this minimum standard of due process, the three-judge court correctly found the challenged

[8] As previously noted, the three-judge court found it unnecessary to address this point in view of its resolution of the due process challenge to the Act. This Court, of course, is free to consider any alternative grounds on which the judgment may be affirmed, including those not reached by the court below. *Langnes v. Green*, 282 U.S. 531, 535-39 (1931).

establishment and relocation provisions of the Act to be grossly deficient. Those provisions permit a private automobile dealer to obtain an automatic injunction restraining the establishment or relocation of a competitive dealership within the 314 square mile "relevant market area," without affording the affected parties any prior notice or opportunity to be heard, without any showing of necessity or likelihood of prevailing on the merits of the protest, and without any review or determination by a public official. The enjoined parties are thus deprived, without a hearing of any kind, of the right to operate their businesses for lengthy periods of indefinite and potentially permanent duration.

The establishment and relocation provisions of the Act thus transgress the fundamental principles of due process in precisely the same manner as the state replevin statutes struck down by this Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972). Those defective statutes, noted the Court, "provide[d] for the issuance of writs ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any other person who claims a right to them and posts a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing." *Id.* 407 U.S. at 69-70. "There is no requirement," the Court continued, "that the applicant make a convincing showing . . . that the goods are, in fact, 'wrongfully detained'. Rather [the] law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily." *Id.* 407 U.S. at 73-74. The affected party "is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing. . . ." *Id.* 407 U.S. at 75.

Moreover, what is perhaps the most invidious defect in this Act's establishment and relocation procedures was

also common to the statutes condemned in *Fuentes*. As this Court noted:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." *Id.* 407 U.S. at 93.

The parallels between the replevin statutes invalidated in *Fuentes* and the challenged portions of the Act are striking and inescapable. Indeed, to the extent there are differences, they render the correctness of the decision below even more compelling. The replevin statutes in *Fuentes* at least required the posting of a bond and, in the case of one of the statutes, a declaration under oath as to the ultimate entitlement of the person to the requested relief. Neither of those "safeguards," as inadequate as this Court found them to be, are present in the case of the instant statute.

There can be no serious question, therefore, as to the failure of the challenged provisions of the Act to measure up to the rudimentary standards of due process. The only questions which appellants raise with respect to the three-judge court's ruling on this point are neither substantial nor novel, but have been squarely decided by this Court adversely to appellants.

Appellants contend that since the deprivation inflicted by the challenged procedures is temporary and since a hearing is ultimately held at some point later in the process, the requirements of due process are satisfied. State Appellants' Jurisdictional Statement at 13-15; Intervenor Appellants' Jurisdictional Statement at 13-14. Those contentions have been flatly rejected by this Court. *Fuentes, supra,* 407 U.S. at 84-86; *Goss v. Lopez,* 419 U.S. 565, 575-76 (1975).

Likewise appellants' suggestion that the requirement of a pre-deprivation opportunity to be heard is applicable only to grievous losses of "the very means by which to live," (State Appellants' Jurisdictional Statement at 15-17), has similarly been dismissed by this Court on more than one occasion. *Fuentes, supra,* 407 U.S. at 88-90; *Goss v. Lopez, supra,* 419 U.S. at 575-76. Nor is this Court's decision in *Mathews v. Eldridge,* 424 U.S. 319 (1976), upon which appellants rely, to the contrary.[9] Rather, *Mathews* is in accord with the basic principle that "the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of a hearing, 'is not decisive of the basic right' to a hearing of some kind." *Goss v. Lopez, supra,* 419 U.S. at 576; *Fuentes, supra,* 407 U.S. at 86.

Equally unpersuasive is appellants' effort to justify the Act's procedures on the basis of those rare emergency

[9] In upholding federal procedures which provided something less than a full judicially-modeled evidentiary hearing prior to non-final termination of Social Security disability benefits, the Court in *Mathews* based its decision on at least three crucial factors present in that case which are patently lacking here: (1) The pre-hearing termination decision was made by a responsible unbiased public official. *Id.* 424 U.S. at 349. (2) The public official's decision was based upon objective, reliable data as to the merits of the ultimate question. *Id.* at 343-47. (3) The affected party was afforded an opportunity to assert his claim, to submit evidence and arguments on his behalf, and to challenge the correctness of the agency's tentative conclusions *prior to any administrative action*. *Id.* at 346, 349. None of these procedural safeguards are afforded affected parties under the Act in this case. Furthermore, the Court in *Mathews* noted that in that case, "a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails." *Id.* at 340. In contrast, parties who ultimately prevail under the Act involved here not only are uncompensated for their pre hearing deprivation but may even suffer permanent loss of their interest prior to the final decision, as was the case with appellee Muller.

situations in which this Court has permitted immediate summary governmental deprivations. There is entirely lacking in this case any of the factors which this Court has deemed essential to justify such summary procedures. *See Fuentes, supra,* 407 U.S. at 91. *See also, Randone v. Appellate Dep't,* 5 Cal.3d 536, 554, 488 P.2d 13, 24-25 (1971).[10]

B. The Affected Interests of Appellees are Protected Under the Fourteenth Amendment

Appellants further contend that the challenged procedures are not invalid under the Due Process Clause because the interests so dramatically affected by the Act are not protected under the Fourteenth Amendment. State Appellants' Jurisdictional Statement at 11-12; Intervenor Appellants' Jurisdictional Statement at 9-13. Such a contention, however, cannot withstand analysis in the light of this Court's decisions.

The Fourteenth Amendment's protection against deprivation without due process of law extends, of course, to deprivations of liberty as well as to those of property. For more than a half-century, since *Meyer v. Nebraska,* 262 U.S. 390 (1923), this Court has recognized that the "liberty" so protected includes the right to engage in business occupations.[11] As the Court stated in *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972):

[10] Those necessary factors enumerated by this Court include: (1) strict control by the state over its monopoly of legitimate force, so that the summary procedures are only initiated by a government official, who might reasonably be expected to serve general public interests rather than secure private advantage; (2) a narrowly drawn statute which provides the government official with meaningful standards to determine whether the summary procedure is necessary and justified in a particular instance; (3) a special need for very prompt action; and (4) a direct necessity for the summary procedures to serve an important governmental or general public, as opposed to a private, interest.

[11] Mr. Justice Rehnquist's criticism of the court below for its reliance on *Meyer* for this point of law, Opinion on Application for Stay at 3-4 (December 6, 1977, Rehnquist, Circuit Justice),

> "'While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right . . . to engage in any of the common occupations of life . . . .' *Meyer v. Nebraska,* 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

There should be no question, therefore, that the right of a person to engage in the occupation of an automobile dealer, as with other occupations,[12] is a "liberty" interest protected against deprivation without due process of law.

Nor can there be any real doubt that those persons against whom the Act's summary injunctive procedures are invoked suffer a deprivation of that protected interest. They may be restrained for an indefinite period from engaging in their livelihood. Those dealers who have a contractual agreement with a manufacturer to establish a new dealership are completely barred from their chosen profession. Even more perniciously, existing dealers who are forced to relocate involuntarily, because their facilities have been condemned, destroyed or rendered unavailable (*e.g.,* through inability to renew a lease) may be effectively put out of business by their competitors. These deprivations, it cannot be stressed

is most perplexing. Not only has this Court itself in recent years relied upon the identical quoted portion of *Meyer* for precisely the same proposition, *See Board of Regents v. Roth,* 408 U.S. 564, 572 (1972), and *Ingraham v. Wright,* 430 U.S. 651, 673 (1977), but Mr. Justice Rehnquist joined in both those opinions.

[12] *See, e.g., Feinberg v. Federal Deposit Insurance Corp.,* 522 F.2d 1335, 1340 n.8 (D.C. Cir. 1975) (bank president); *Keker v. Procunier,* 398 F.Supp. 756, 760 (E.D. Cal. 1975) (attorney); *Larkin v. Bruce,* 352 F.Supp. 1076, 1077 (E.D. Wisc. 1972) (doctor). A statute which purported to empower attorneys or doctors arbitrarily to restrain other practioners from establishing or relocating practices nearby, under the procedures set forth in the Act here, would surely be held unconstitutional.

too strongly, are not uniformly visited upon all members of the occupational group who seek to establish or relocate dealerships, nor do they occur as a result of any deliberative determination by a public official that the public interest so requires. Rather, they are inflicted arbitrarily, upon the mere request of a self-interested private competitor, who himself already enjoys those rights.

Appellants assert, purporting to rely upon *Paul v. Davis*, 424 U.S. 693, 710-11 (1976), that the liberty interests here affected by the Act are not protected because, with the exception of those few liberties spelled out in the Bill of Rights, a liberty interest is protected against state deprivation by the Fourteenth Amendment only if the state has chosen to recognize that liberty interest. State Appellants' Jurisdictional Statement at 11-12; Intervenor Appellants' Jurisdictional Statement at 11.

Not only does this absurdity of circular reasoning evidence a fundamental misunderstanding of the nature and source of American liberties,[13] but it misrepresents the holding of *Paul v. Davis* as well. When this Court indicated in that case that certain interests protected under the Fourteenth Amendment "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law," it made

[13] There is surely no principle more fundamental to the American concept of limited government than the principle that an individual does not derive his right to liberty as the result of a grant from the state. On the contrary, the state derives its limited powers as the result of a grant from the people. To say that the Fourteenth Amendment restricts a state from depriving a person of liberty without due process of law, but that the state is free to recognize, define and delineate liberty as it chooses, would obviously render meaningless that protection. Liberty is not a state-created right. *Logan v. United States*, 144 U.S. 263, 287 (1892) ("[T]he rights of life and liberty were not granted by the Constitution, but were natural and inalienable rights of man."); *cf. Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell and Blackmun, JJ., concurring in part).

explicitly clear the fact that it was speaking not of "liberty" in its traditional sense (*i.e.*, freedom from governmental restraint) as is involved in this case, but rather of those entitlements or benefits which are the creations of the state in the first instance, such as good-time credits in prison — those "variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." *Id.* 424 U.S. at 710. To apply the same rule to basic liberty interests, which do *not* derive their constitutional status as a result of creation by the state, would, as noted, render the Fourteenth Amendment's protection against their deprivation virtually meaningless.

Furthermore, the liberty interests affected by the Act would be protected even under the terms of appellants' proposed "state-recognition" rule. Not only has the State of California regulated since 1923 and licensed since 1957, the right of a person to engage in the occupation of an automobile dealer (State Appellants' Jurisdictional Statement at 5, n.1),[14] but California specifically recognizes the right to operate an automobile dealership as an interest protected under the Fourteenth Amendment.

[14] Mr. Justice Rehnquist's tentative conclusion that the affected interests involved here are not protected under the Fourteenth Amendment appears to have been based at least in part upon his misimpression that prior to passage of this Act, there was an "absence of state regulation in the field." Opinion on Application for Stay at 4. Mr. Justice Rehnquist further indicated that, "If California had by statute conferred upon automobile dealers the right to establish and relocate franchises wherever they chose, and then imposed procedural hurdle[s] such as the one here in question before the right could be effectuated," his conclusion might well be different. *Id.* at 5. That is, in fact, precisely the situation in this case. Since 1957, a licensed automobile dealer in California could establish or relocate his dealership at any location he chose, as long as he merely notified the Department of Motor Vehicles of the place where he was establishing or relocating the dealership. Cal. Veh. Code § 11712(a). Not until passage of this Act in 1973, were persons subject to arbitrary abridgment of this statutorily-recognized right without any opportunity to be heard.

See Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd., 30 Cal.App.3d 494, 500-01, 106 Cal.Rptr. 340, 344 (1973).

Finally, this Court has suggested as well that the right to the benefits of an automobile franchise is precisely the sort of "entitlement" which is included in our modern-day concept of "property" as protected under the Fourteenth Amendment. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1965). Such an "entitlement" is not, as appellants suggest, a mere unprotected "expectancy," but is instead supported by mutual and explicit contractual understandings between franchisor and franchisee. *See Perry v. Sindermann*, 408 U.S. 593, 601 (1972). The summary injunctive procedures of the Act deprive the affected individuals of the benefits of the use of that property without due process of law.

II. THE DISTRICT COURT WAS NOT REQUIRED TO ABSTAIN FROM ADJUDICATING THE FEDERAL CONSTITUTIONAL ISSUES POSED BY THE STATE STATUTE, WHERE THE COURT FOUND THAT THE STATE ACT WAS UNAMBIGUOUS AND THAT NO STATE LITIGATION WAS PENDING WHICH MIGHT RESOLVE OR ELIMINATE THE FEDERAL ISSUES PRESENTED, AND WHERE THERE WERE NO UNCERTAIN STATE LAW ISSUES WHICH COULD POTENTIALLY HARMONIZE THE ACT WITH FEDERAL CONSTITUTIONAL REQUIREMENTS

State Appellants contend that the district court was required under this Court's decisions in *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975), and *Bellotti v. Baird*, 428 U.S. 132 (1976), to abstain from adjudicating the federal constitutional issues tendered in this action because of the postulated "existence of issues of state law whose resolution in the State forum would

at the very least substantially modify [those] federal issues." State Appellants' Jurisdictional Statement at 18-25. Such a contention is patently without merit and was correctly rejected by the court below after careful and responsible consideration.

Having considered both of the proffered interpretations of the Act and the claimed uncertain issue of state law which appellants now repeat to this Court, the three-judge court found the Act "to be clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process." Opinion at 39. The court further noted that it had withheld its decision in this matter for several months to await resolution of various pending state cases which, although they involved issues wholly unrelated to those presented in the instant case, appellants had suggested could unexpectedly result in an adjudication which would in some unexplained manner affect the resolution of this case. That had not occurred. The district court concluded that under such circumstances, abstention was not called for, and it was obliged to act. Opinion at 39.

The court's conclusion was manifestly correct. *See Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965). This Court's decisions in *Harris County* and *Bellotti* do not indicate otherwise. This is in no manner a case, as in *Harris County*, where "the federal claim . . . is 'entangled in a skein of state law that must be untangled before the federal case can proceed.'" *Harris County Commissioners Court v. Moore, supra*, 420 U.S. at 88. Nor is it a case, such as *Bellotti*, where there is an ambiguous state statute which is susceptible of a construction by the state courts which might avoid or materially resolve the federal constitutional issues (the court below specifically found to the contrary) and where the high court of the state has a certification procedure by which that ambiguity can easily and quickly be resolved. *Bellotti v. Baird, supra*, 428 U.S. at 138-39, 150-51.

In concluding that abstention was not called for in this case, the court below was no doubt mindful of this Court's teaching in *Harris County Commissioners Court v. Moore, supra,* 420 U.S. at 83:

> "We have repeatedly warned, however, that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in 'special circumstances', [citation] and only upon careful consideration of the facts of each case."

This is surely not such a "special circumstance." State Appellants' claim of the existence of an "uncertain issue of state law" and of two alleged ambiguities in the statute remain as unpersuasive on appeal as they did below.

The "uncertain issue of state law" which appellants have concocted is particularly absurd. Appellants theorize (although they certainly do not urge such a construction themselves) that a hearing might be required prior to issuance of the Board's injunction as a matter of state law, under *Endler v. Schutzbank,* 68 Cal.2d 162, 436 P.2d 297 (1968).[15] Such a contention is nonsense, because *Endler* is wholly irrelevant to this case for two important reasons.

First, the California Financial Code sections which provided statutory authority for the hearing to which

[15] *Endler* simply held that a complaint which alleged that plaintiff was denied the opportunity to pursue his licensed occupation as a financial broker because of unfounded allegations by the State Commissioner of Corporations of dishonesty, which plaintiff had never been given an opportunity to rebut, stated a cause of action for denial of due process rights, as a matter of *federal constitutional law. Id.* 68 Cal.2d at 169-70, 436 P.2d at 302. The Court went on to note that if plaintiff proved such a denial of federal constitutional rights, the Commissioner of Corporations had statutory authority under sections of the California Financial Code – wholly inapplicable to the Vehicle Code Act involved here – to provide the hearing to which plaintiff was entitled under the Fourteenth Amendment. *Id.* 68 Cal.2d at 182 n.16, 436 P.2d at 311 n.16.

plaintiff in *Endler* was, as a matter of federal constitutional law, entitled are not incorporated in and are wholly inapplicable to this Act. It is manifestly clear that nowhere in the Act is any provision made for a hearing prior to issuance of the automatic injunction.[16] The Act is, as the three-judge court found, unambiguous on that point. Hence even if the state courts were to "search the governing statute to find the necessary authority for the agency to provide a hearing" prior to issuance of the automatic injunction, as appellants suggest they might under *Endler* (State Appellants' Jurisdictional Statement at 20), they would clearly find none in this Act.

Secondly, appellants' contention that resolution of the federal constitutional issue could be avoided under *Endler* is obviously not correct. *Endler* held that *if* a plaintiff proved he has a right to a hearing under the Fourteenth Amendment, he should be given an administrative (as opposed to a judicial) hearing if the state officer or agency has statutory authority to provide one. Hence, this is clearly not a situation where the federal constitutional issue turns upon or may be avoided by the resolution of some uncertain issue of state law. Rather, even to reach the *Endler* state law issue, one must first resolve the basic federal constitutional issue, which federal issue appellants would have the district court abstain from deciding. Such a contention turns the doctrine of absention on its head.

Appellants' two remaining "ambiguities" bear little further discussion. Appellants' point that the Board "could" hold the protest hearing as early as a state court might require it to be held (State Appellants' Jurisdic-

[16] Appellants' suggestion that § 3067 of the Act might make provision for such pre-injunction hearing (State Appellants' Jurisdictional Statement at 20-21) is simply false. § 3067 deals explicitly with hearings by the Board following submission of the hearing officer's proposed decision. *Id.* Exhibit H at 76. This, of course, occurs long after issuance of the automatic injunction.

tional Statement at 21) proves nothing. Section 3062 has no requirement for a prompt hearing; State Appellants have not provided affected parties with such a prompt hearing; and appellants cite no authority whatever for the proposition that such a prompt hearing might be required as a matter of state law. Appellants' final point that a state court "may" construe § 3062 of the Act to require "advance notice" of proposed establishments or relocations (State Appellants' Jurisdictional Statement at 22) is equally beside the point. Appellants again cite no authority for the theory that such "advance notice" might be required as a matter of state law. Such a construction, moreover, would in no way substantially affect the basic constitutional issue of whether private parties can be permitted arbitrarily to restrain the liberty of others without affording the affected parties an opportunity to be heard.[17]

To hold that the district court below was required to abstain from adjudicating the denial of important federal constitutional rights which this case presented, on the basis of the unsupportable and speculative contentions made by appellants would conflict with the recent admonition of this Court in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 481 (1977):

> "As has been noted, *Pullman* abstention is an equitable doctrine that comes into play when it appears that abstention may eliminate or materially alter the constitutional issue presented. There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented. That point has been reached and surpassed here."

[17] Appellants' brief reference in a footnote to two pending state court cases involving the Act (State Appellants' Jurisdictional Statement at 25 n.4) deserves an equally brief reply. Those cases, with which the court below was thoroughly familiar, involve challenges to the Act which, as appellants have readily admitted, are wholly unrelated to the issues in this case.

III. THE JUDGMENT OF THE COURT BELOW SHOULD BE SUMMARILY AFFIRMED ON THE ALTERNATIVE GROUND THAT THE CHALLENGED PORTIONS OF THE ACT SQUARELY CONFLICT WITH THE FEDERAL ANTITRUST LAWS AND ARE THEREFORE INVALID UNDER THE SUPREMACY CLAUSE

Even if this Court should conclude that the due process questions presented by appellants would otherwise be substantial enough to warrant further briefing and argument, the judgment of the three-judge court should nonetheless be summarily affirmed. The establishment and relocation provisions of the Act effect restraints on trade which are patently inconsistent with and contrary to the mandate of the Sherman Act. Hence those provisions, which the court below found to be unconstitutional on due process grounds, must fall as well under the Supremacy Clause.

It is well established that horizontally imposed territorial trade restraints and market allocations constitute *per se* violations of the Sherman Act. *United States v. Topco Associates*, 405 U.S. 596, 608 (1972); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Yet these unlawful trade restraints and market allocations are facilitated and encouraged under the provisions of the state Act in question.

The Act gives existing automobile dealers within the "relevant market area", acting alone or in concert, the unrestrained power unilaterally to invoke an injunctive order against the establishment or relocation of an existing or potential competitor. Because the injunction is automatic and because there is no requirement for a prompt hearing and decision on the merits following peremptory issuance of the injunction, existing dealers are able to protect, for a lengthy period of indefinite duration, the 314 square mile area within which they do business from the entry of new competition as well as from the

relocation of existing dealerships with which they may already compete.

That this scheme of horizontally-imposed territorial trade restraints facilitated by the state statute is proscribed by the Sherman Act is evidenced by its comparison with an almost identical scheme considered by the Third Circuit in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). When a new franchise application was submitted to Holiday Inns, the company sent notices to at least three of the existing Holiday Inn franchisees nearest the proposed site. If one or more of the notified franchisees protested the proposed franchise, the new franchise could be established only after review and approval by the company's executive committee. "By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the . . . market," ruled the court, defendant "enabled its franchisees already in the . . . area to divide the market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act." *Id.* 521 F.2d at 1242.

The provisions of the Act which give existing automobile franchisees the power to restrain new competitive entry in their areas are strikingly parallel to the scheme condemned in *American Motor Inns.* The Act thus purports to authorize and indeed promotes private conduct clearly proscribed by, and in conflict with, the antitrust laws of the United States. State Appellants attempted below to close the court's eyes to this conflict by reference to this Court's observation in *Joseph E. Seagram & Sons. v. Hostetter,* 384 U.S. 35 (1966), that in areas of coincident federal and state regulation, courts should avoid "seeking out" conflicts where none clearly exist.[18] That observation, however, was made in the context of a state

[18] The attempt below by the California Attorney General, in his present role as advocate on behalf of State Appellants, to deny the anticompetitive effect of the Act and its conflict with the antitrust laws is in sharp and telling contrast to his earlier opposition to the Act on precisely the same grounds advanced by appellees. In opposing the challenged portions of the Act when they were before the California Legislature, the California Attorney General observed, "Assembly Bill 225 [the Act] which has been reviewed by our legal staff, has an apparent anticompetitive effect on the new car market." After describing the establishment and relocation provisions of the Act, the Attorney General continued, "The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law. Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963)." "The anticompetitive aspects of Assembly Bill 225," the Attorney General concluded, "force us to take a position of opposition." Letter of August 3, 1973 from Attorney General Evelle Younger of the State of California to Assemblyman J. A. Gonsalves of the California State Assembly. Reply Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, Exhibit A.

statutory price reporting provision which itself had no anticompetitive effect and did not specifically authorize anticompetitive acts.[19] In order for there to be any Sherman Act violation, action would have had to be taken beyond the parameters of the statute through misuse of the reported price information. In contrast, the Act at issue in this case mandates the issuance of an injunction restraining competition upon the filing of a protest by an existing automobile dealer. The existing dealers need do nothing outside the parameters of the statute to effect the horizontal restraint on trade which is a *per se* violation of the Sherman Act.

Because the Act thus facilitates and promotes private conduct clearly proscribed by the antitrust laws of the United States and is in conflict with the operation and underlying economic policy of those federal statutes, the challenged state provisions must fall under the Suprem-

[19] The challenged New York statute in *Seagram* required distillers to file their monthly price schedules for sales to wholesalers and retailers together with an affirmation that such prices were "no higher than the lowest price" at which sales were made by the distiller or by wholesalers who distributed substantial amounts of the distiller's brand.

acy Clause. As this Court explained in *Perez v. Campbell*, 402 U.S. 637, 649 (1971):

> "As early as *Gibbons v. Ogden*, 9 Wheat 1 (1824), Chief Justice Marshall stated the governing principle — that 'acts of the State Legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause. *Id.* at 211 . . . '[i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (Emphasis by the Court.)

The Act's invidious impact on competition and its patent conflict with the federal antitrust laws cannot be shielded from Supremacy Clause invalidation under the narrow, and ever-shrinking, state action umbrella of *Parker v. Brown*, 317 U.S. 341 (1943). Unlike the present case, the Court in *Parker* was faced with a state statute which was consistent with a clearly expressed federal regulatory policy. This crucial distinction was well explained by the court of appeals in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 936 (D.C. Cir. 1971) *cert. denied*, 404 U.S. 1047 (1972):

> "Since the Court [in *Parker v. Brown*] found the state regulation harmonious with the federal agricultural regulatory scheme, the Supreme Court could safely find that Congress had no intent to have the already existing antitrust laws forbid this type of state action, *i.e.*, state agricultural regulation. The Congress had already enacted a federal Agricultural Adjustment Act which was inconsistent with the application of the previously existing federal antitrust laws in this area, the congressional agricultural statute was of equal dignity with the antitrust statute, and the state agricultural action was harmonious with the federal regulation; hence, the Supreme Court did not apply the

> prohibitions of the antitrust laws to this type state regulatory action."

In contrast to *Parker*, Congress has evidenced no such intent to carve an exemption for automobile franchising from the national policy of free competition as reflected in the antitrust laws. To the contrary, Congress has specifically expressed its intent to preserve and enhance competition in the area of automobile franchising, and its desire that the antitrust laws remain in force in that economic sphere. In enacting the Automobile Dealers' Day in Court Act (15 U.S.C. §§ 1221-1225), which gave automobile franchisees a statutory right to sue franchisors for acts or threats of coercion or intimidation in connection with the performance or termination of any franchise agreement, Congress took care to make clear its intent that the legislation did not "repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States." 15 U.S.C. § 1224. Congress' preeminent concern with the preservation of pro-competitive antitrust policies in this area was spelled out in the report on the legislation by the House Committee on the Judiciary, which emphasized:

> "[T]he bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of this legislation.*" H. R. Rep. No. 2850, 84th Cong., 1st Sess. (1956) (Emphasis added).

The California Automobile Franchise Act is precisely the sort of "curtailment" of normal competition that the House Judiciary Committee regarded as "inconsistent" with Congress' antitrust objectives in the area of automobile franchising and consequently cannot qualify for exemption under the doctrine of *Parker v. Brown*.

Moreover, appellants' attempt below to invoke the narrow *Parker* exemption in this case confuses the question of whether state officials are insulated from liability under the Sherman Act for anticompetitive acts, with the very different question of whether a state statute which conflicts with federal law must give way under the Supremacy Clause. As this Court recently made clear in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 588-90 [Part II, plurality opinion of Stevens, Brennan, White and Marshall, J.J.] 606-07, 613-14 n.5 [concurring opinion of Blackmun, J.] (1976), it is only the former question which *Parker* resolved. The latter question, which is the one presented in the instant case, is instead the issue addressed by this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

In *Schwegmann*, the Court was faced with a Louisiana law which permitted resale price maintenance agreements between distributors and retailers, and further provided that once any distributor and a single retailer had entered into such an agreement, all other retailers were compelled by law to observe the maintained minimum price for that commodity which had been agreed upon by the contracting parties. Noting that the fixing of minimum prices was illegal *per se* under the Sherman Act, the Court went on to observe as a given that "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval of Congress." *Id.* 341 U.S. at 386. The Court found a specific exemption for the voluntary resale price maintenance agreements between distributor and retailer in the Miller-Tydings amendment to the Sherman Act, but that amendment's exemption did not extend to enforcement of minimum prices against those who had not voluntarily entered into such agreements. The Court therefore concluded that only those portions of the Louisiana statute which permitted enforcement of the voluntary resale price maintenance agreements among the contracting parties escaped invalidation under the Sherman Act. *Id.* 341 U.S. at 395.

Schwegmann thus stands for the proposition that, absent an express congressional intent to the contrary, state laws which conflict with the Sherman Act are invalid under the Supremacy Clause and are unenforceable.[20] It is certainly true, as Mr. Justice Blackmun recognized in his concurring opinion in *Cantor, supra,* 428 U.S. at 609, that it would not be easy to fashion an all-inclusive rule which the courts could use readily to determine which state laws are pre-empted by federal antitrust law and to what extent. But where, as here, a state statute purports to empower private businesses unilaterally to invoke state processes to accomplish *per se* violations of the Sherman Act, it is so dramatically at odds with federal antitrust policy that the state statute must, as in *Schwegmann*, give way under the Supremacy Clause. As this Court said in *Northern Securities Co. v. United States*, 193 U.S. 197, 350 (1904):

> "[N]o state can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress."

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[20] This is surely the intent of Congress on the matter as well. As evidenced in the 1975 repeal of the Miller-Tydings amendment to the Sherman Act, Congress has expressly recognized that state fair trade laws, absent specific Congressional exemption, must give way to the Sherman Act. In explaining the original necessity for the amendment, Senate Report No. 94-466, 94th Cong. 1st Sess. (1975) pointed out that soon after the first state fair trade law was passed in 1931, "It became apparent, however, that any state law which applied to interstate commerce violated Federal antitrust laws. Thus, in 1937, Congress passed the Miller-Tydings Act granting state fair trade laws an exemption from the Sherman Antitrust Act." Such language leaves little room for doubt as to Congressional intent that state laws inconsistent with the Sherman Act are invalid.

CONCLUSION

For all of the foregoing reasons, the judgment of the three-judge court should be summarily affirmed.

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